Supreme Court, U.S.
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No. 97-34

IN THE
**SUPREME COURT**
**OF THE UNITED STATES**

OCTOBER TERM 1997

DIANE HICKS,
*Petitioner,*

v.

WESTINGHOUSE MATERIALS COMPANY, *et al.*,
*Respondents.*

**On Petition For A Writ Of Certiorari**
**To The Supreme Court of Ohio**

# BRIEF OF RESPONDENT NLO, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## LIST OF PARTIES PURSUANT TO RULES 14.1(b) and 29.6

The parties to this action are, Diane Hicks, Petitioner, and NLO, Inc. *sub nom.* Westinghouse Materials Company, the Industrial Commission of Ohio, and the Bureau of Workers' Compensation, Respondents.

Respondent NLO, Inc. ("NLO") has no nonwholly owned subsidiaries. NLO's parent company is NL Industries, Inc., which is a publicly traded company, whose two major shareholders are Valhi, Inc. and Tremont Corp., both publicly traded companies.

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## I. STATEMENT OF THE CASE

### A. Factual Background & Procedural Posture

Lawrence W. Hicks, an employee of Respondent NLO, died May 20, 1985 at Bethesda Oak Hospital, Cincinnati, Ohio. The local Coroner determined the cause of death to be acute interstitial myocarditis--inflammation of the heart. Death Certificate, Plaintiff's Ex. 37, admitted at Trial Transcript ("T.") p. 1193. His widow, Petitioner Diana T. Hicks, asserted a claim for workers' compensation benefits, alleging that the death was caused by the effects of an accident at work on May 8, 1985, in which he and a co-worker, for 10-15 seconds, were below a dark puff of "smoke" emitted above their heads by a vacuum cleaner they were using. T.p. 719-20, 738-39, 748-49.

When, in 1989, the Industrial Commission of Ohio denied Petitioner's 1987 claim for death benefits relating to the May, 1985 death of Lawrence W. Hicks, Mrs. Hicks appealed to the Court of Common Pleas of Hamilton County, Ohio. After a two week trial, the jury concurred with the Industrial Commission and rendered a verdict for Respondents. Verdict, T.d. 120. Judgment was entered thereon in April, 1993, Judgment Entry, T.d. 123, Petitioner's Motion for a New Trial was overruled in January, 1994, Decision on Motion for New Trial, T.d. 133, Petitioner's Appendix at A-2, and Petitioner appealed to the Court of Appeals, First Appellate District, Hamilton County, Ohio.

Petitioner appealed the decision of the trial court, raising, among other issues, an appeal of the trial court's decision rejecting Petitioner's Batson challenge to the peremptory strike of prospective juror Donna Adams. In addressing the Batson juror selection issue raised in this appeal, the Ohio Court of Appeals concluded that "in light

of the valid, race-neutral reasons articulated to defend the use of peremptory challenges by the appellees, and in light of Hick's failure to make a timely objection to the challenge of prospective juror Balasubramaniam, we cannot conclude that the trial court's decision to permit the challenge was clearly erroneous." Petitioner's Appendix at p. A25. Petitioner then sought reconsideration of the decision of the Court of Appeals, but her application was denied.

On November 13, 1995, Petitioner sought appeal of this decision to the Ohio Supreme Court, with the case being argued before the Ohio Supreme Court on November 12, 1996. In its opinion, issued April 2, 1997, the court affirmed the trial court stating:

> Our view of the law and record compels us to conclude that the trial judge properly applied the standard as articulated in Batson. Accordingly, we cannot say that the decision of the trial court to grant appellees' peremptory strike was clearly erroneous. We therefore affirm the judgment of the court of appeals and hold that the peremptory challenge exercised by appellees did not violate constitutional law.

Petitioner's Appendix at A6. The court further concluded that the trial court had not "misunderstood" Batson, stating that "[t]he trial court fulfilled its basic constitutional duty; appellees' peremptory strike did not unconstitutionally compromise the integrity of the jury selection process in any way." Id. at A14.

## B. Jury Selection Process.

Jury voir dire was conducted on a two-step basis: first individually, during which knowledge of and connection to the NLO-managed facility at Fernald and pending class actions relating to it were explored, and then as a group, during which the more usual subjects of voir dire were covered. Prospective jurors were excused at both levels of the process by both parties. See, e.g., T.p. 426, 436, 539-43, 583. Both parties made use of challenges for cause as well as peremptory challenges. See, e.g., T.p. 426, 436, 575, 583.

At the beginning of the voir dire process, there were six African-American venirepersons out of a total of thirty-four, or 16.6 percent of the total venire.[1] Out of these six African-American venirepersons, two, Jurors Croft and Graham, ultimately served on the jury which rendered a verdict in favor of Respondents. Therefore, while the original venire was 16.6 percent African-American, the makeup of the final jury was 25 percent African-American. Of the four African-Americans who did not serve on the final jury, one failed to return for the second day of voir dire, two were excused by the Court for cause, and one was excused peremptorily by the Respondents. It is Respondent's exercise of a peremptory challenge against

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[1]Petitioner's Appendix at A-2. Petitioner offers a chart at Appendix F to her Petition which she claims supports her argument concerning racial discrimination in the exercise of a peremptory challenge to Ms. Adams. This chart is not part of the record of the proceedings below and nothing in the record supports the validity of this chart. In fact, apart from Ms. Adams (peremptorily excused) and Ms. Elahee (excused for cause), there is no clear indication in the record of this case as to the race of any person in the venire. Therefore, the Court may not and should not consider this chart in its deliberations.

prospective juror Donna Adams which is the sole issue before the Court on this appeal.

During voir dire, Petitioner's counsel objected to NLO's peremptory challenge to Ms. Adams pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), alleging that the sole motivation for the use of a peremptory strike to excuse Ms. Adams from the venire was Respondent's discriminatory bias against African-American jurors. T.p. 577. Because Petitioner mischaracterizes the process undertaken by the trial court in responding to her objection to the exercise of a peremptory challenge against Ms. Adams, it is necessary to examine this process in detail. Petitioner would have the Court believe that the trial court paid no heed to her objection or to her arguments in support of the objection. In fact, even assuming the trial court could have articulated its understanding of the Batson inquiry in a more artful fashion, the trial court listened to the arguments presented by counsel for Petitioner and determined that she had not sustained her burden of showing invidious racial discrimination as required under Batson.[2]

When Petitioner raised an objection and demanded an explanation for the exercise of a peremptory challenge against Ms. Adams, the trial court concluded that an explanation outlining the reasons for the peremptory challenge was in order pursuant to Batson. T.p. 577. Following this determination by the trial court, NLO's counsel articulated those reasons on the record as required by the second step of the analysis under Batson, stating in part:

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[2]The Ohio Supreme Court stated that "[w]hile less than artful, the trial court conducted a proper Batson inquiry." Petitioner's Appendix at A14.

> Miss Adams is -- Miss Adams is an unemployed women who has a very limited educational background. This is a case that involves some technical issues and medical testimony.
>
> We're concerned by the answers that we received yesterday that those issues require a certain level of sophistication that may not be present in this particular juror. And that's why we are asking peremptorily that she be taken off the panel. And this is directed -- this is not a racial issue and it has nothing to do with race. It is an issue that deals with what we think to be her duty to function as a juror in this case.

T.p. 577.

Two counsel for Petitioner then challenged the race neutral explanation offered by counsel for Respondent NLO for the peremptory challenge to Ms. Adams, claiming that Ms. Adams educational and employment history was not sufficiently different from other prospective jurors to support the race neutral explanation being offered. T.p. 578.

In response to the arguments presented by counsel for Petitioner, counsel for Respondent NLO offered a further explanation, stating:

> But we're making a determination based upon what we think is their ability to understand issues, watch their reactions to questions. And it's not just questions that you ask; its the reaction to other questions that are asked and their reactions to that.

T.p. 578-79.

Following this exchange, the trial court considered the arguments presented and raised questions concerning the educational level of Ms. Adams as compared to the educational level of other prospective jurors, stating:

> Let me make it clear that if there are quite a number whose educational level from the questionnaires shows the same level of education, then this isn't as persuasive as it would be if there were only two or three or in the category of dropping out of school in the tenth grade or whatever she did.

T.p. 579. After raising this concern, the trial court allowed counsel for Petitioner the opportunity to further argue that other prospective jurors on the panel had educational levels similar to Ms. Adams. T.p. 579-82.

During this period of the proceedings, the trial court continued to hear and consider arguments from both counsel for Petitioner and counsel for Respondent NLO on the peremptory challenge to Ms. Adams. T.p. 579-82. After reviewing the juror questionnaires, counsel for Petitioner offered the educational level of Mrs. Bishop, a prospective juror not currently on the panel (and who was never seated), as a point of comparison to the educational level of Ms. Adams. T.p. 581-82. Counsel for Petitioner was unable to point to any prospective juror who was currently on the panel. T.p. 582. Thus, when challenged and asked to produce any evidence supporting their objection to the peremptory challenge to Ms. Adams, Petitioner failed to produce any evidence of racial bias in the juror selection process.

Throughout this process, Petitioner was given a full opportunity to point to circumstances in the proceedings

before the trial court which supported her argument that the exercise of a peremptory challenge against Ms. Adams was racially motivated, so that she could sustain her burden of showing that the explanatory statement offered by counsel for Respondent NLO was merely a pretext for racial discrimination. After hearing the explanation offered by counsel for Respondent NLO, the arguments presented by counsel for Petitioner and after further reviewing the venire, the trial court concluded that Petitioner had failed to sustain her burden under Batson of proving invidious racial discrimination in the peremptory challenge to Ms. Adams. Therefore, as required under Batson, the trial court accepted the explanation for the peremptory challenge offered by counsel for NLO and overruled Petitioner's objection. T.p. 582.

Petitioner again raised the issue of Respondent's exercise of a peremptory strike against Ms. Adams in its Motion for a New Trial. The trial court, after considering the same issues and arguments which Petitioner had raised during the trial, concluded that counsel for Respondent NLO was not motivated by racial animus in using a peremptory challenge to remove Ms. Adams from the venire. In so concluding, the trial court stated:

> Donna Adams, aside from her want of normal secondary education, was, in the Court's opinion, not capable of following the path of the evidence in the case before the Court and was strongly desirous of being elsewhere than in the courtroom.

Decision on Motion for New Trial, Petitioner's Appendix at A35.

In her petition, Petitioner presents the same arguments which have been rejected twice by the trial court,

twice by the Ohio Court of Appeals, and once by the Ohio Supreme Court concerning the exercise of a peremptory challenge to Ms. Adams.

Petitioner does not claim that the trial court was clearly in error in its decision. Petition at pp. 20-22. Petitioner seeks to have this Court perform some form of basic fact finding, a role which this Court has historically not seen as its function. Petitioner asks this Court to ignore the "clearly erroneous" standard, established by this Court and the Ohio Supreme Court as the proper standard to review a lower court's finding of fact under Batson, in favor of some new standard which Petitioner fails to articulate. Petition at pp. 20-22. See, e.g., Hernandez v. New York, 500 U.S. 352, 369 (1991); State v. Hernandez, 89 N.E.2d 1310, 1314 (Ohio), cert. denied, 506 U.S. 898 (1992).

## II. REASONS WHY THE PETITION SHOULD NOT BE GRANTED.

### A. Petitioner's Petition Presents No Constitutional Issue.

The most basic problem with Petitioner's Questions Presented is that they address no particular *issue* of constitutional import to this Court. While the petition involves constitutional concepts, no issue is resolved by it. The law as to jury selection has been clearly defined in Batson and its progeny. This Court has established the jurisprudence in this area.[3] The responsibilities and duties

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[3]Batson and its progeny operate to insure that peremptory strikes are not employed in the juror selection process in a racially discriminatory fashion. The law developed through these cases does not constitutionally require that a petit jury be composed, in whole or in part, of persons who are members of a particular racial group. Batson, 476 U.S. at 85

of the trial court upon the assertion of a Batson-based challenge are set forth clearly in the existing cases, most recently in Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).[4] Petitioner does not suggest that this Court's plainly articulated law in this area should be somehow modified. Rather, what are at issue in this Petition are disputed issues of fact and an alleged misapplication of a rule of law, neither of which are appropriate issues for review by this Court according to its rules. Rule 10, Rules of the United States Supreme Court. Essentially, Petitioner is attempting to transform a request for a review of a trial court's factual determination into a review of a constitutional question, in an area where there is no constitutional question.

This Court in Batson, and its progeny, held that it is constitutionally impermissible for a litigant, whether civil or criminal, to exclude potential jurors purely on the basis of

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(citing with approval Strauder v. West Virginia, 100 U.S. 303 (1880) overruled on other grounds, Taylor v. Louisiana, 419 U.S. 522 (1975)).

[4]In Purkett, announced May 15, 1995, the Supreme Court reiterated the steps that are to be taken when a peremptory challenge is opposed as being racially motivated. As articulated by the Court, those steps are:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful discrimination.

Purkett, 514 U.S. at __, 115 S. Ct. at 1770-71.

membership in any particular racial group.[5] Such membership obviously does not constitute "cause" for excusing members of the venire, and thus the cases analyzing this issue deal exclusively with the use of peremptory challenges.[6]

The Court's Purkett decision holds: first, that the burden of proving purposeful racial discrimination rests and always remains with the opponent of a strike under Batson, and second, that a race-neutral explanation by the proponent of the strike may be silly and implausible and still satisfy the second step of the Batson analysis, so long as the explanation is facially race-neutral. Purkett, 514 U.S. at ___, 115 S. Ct. at 1770-71. If the proponent of the strike offers a race-neutral explanation for the use of the strike, the party challenging the strike must meet its burden of producing credible competent evidence that the explanation which has

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[5]See Batson, 476 U.S. 79; Hernandez v. New York, 500 U.S. 352; Edmonson v. Leesville Concrete, 500 U.S. 614 (1992); and J.E.B. v. Alabama, ex rel T.B., 511 U.S. 127 (1994). See also State v. Hernandez 589 N.E.2d 1310 (Ohio 1992).

[6]It is also appropriate to note that Petitioner seeks to use challenges for cause by the defense to help demonstrate purposeful discrimination on the part of the defense in the jury selection in this case. Such a claim is simply insupportable. Whether a particular venireman has something in his or her background which, in the view of the trial court, disqualifies that person as a juror in this case is completely beyond the control or influence of any of the parties to the case. Indeed, were this (or any) court to permit use of cause challenges to demonstrate "purposeful discrimination" the result would be paradoxical, since biased veniremen would inevitably be permitted to remain on the jury to avoid the possibility of their dismissal for cause being used as a basis for finding racial animus in some later peremptory challenge. Further, such use of challenges for cause defies logic, since by definition, the cause itself is the motivation to remove the offending venireman, not some potential prejudice by a party for or against any particular race or class.

been offered is merely a pretext for purposeful racial discrimination. Id.

Although Petitioner may disagree with the wisdom of the rulings of this Court in determining the issues involved in a challenge to a peremptory strike allegedly based on racial animus, she cannot argue that the responsibilities of the various parties are ambiguous after the Court's decision in Purkett. This Court has stated that, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Hernandez v. New York, 500 U.S. at 369. Petitioner asks this Court to ignore this standard.

### B. The Trial Court Properly Concluded That Petitioner Had Failed To Sustain Her Burden Of Showing That The Exercise Of A Peremptory Strike Against Donna Adams Was Motivated By A Racially Discriminatory Intent.

Batson and its progeny operate to insure that peremptory strikes are not employed in the juror selection process in a racially discriminatory fashion. The law developed through these cases does not require that a petit jury be composed, in whole or in part, of persons who are members of a particular racial group. Batson, 476 U.S. at 85 (citing with approval Strauder v. West Virginia, 100 U.S. 303 (1880), overruled on other grounds, Taylor v. Louisiana, 419 U.S. 522 (1975)). The law does require that the party seeking to peremptorily exclude a particular juror must offer, when a prima facie showing of racial discrimination has been made, a "race-neutral" explanation for the exclusion. Batson, 476 U.S. at 97. In order to

avoid constitutional infirmity, this "race-neutral" explanation need not, however, rise to the level of the explanation required to excuse a prospective juror for cause. Id. See also State v. Hernandez, 589 N.E.2d at 1314-15.

Petitioner, therefore, is not entitled to a jury which necessarily includes even one member of any particular racial group. Rather, Petitioner is entitled to a juror selection process which is free of racially discriminatory bias.

In this case, counsel for Respondent NLO offered a factual and objective explanation for the peremptory challenge to Ms. Adams; one which was specifically related to the trial at hand. It certainly was appropriate for counsel for Respondent NLO to conclude that the education, sophistication and demeanor of a prospective juror were important issues in determining the effectiveness of a juror in a multi-week trial focused on issues related to potential radiation exposure and in which ten experts would testify.

If the proponent of the strike offers a race-neutral explanation for the use of the strike, the party challenging the strike must meet its burden of showing that the explanation which has been offered is merely a pretext for purposeful racial discrimination. Purkett, 514 U.S. at ___, 115 S.Ct. at 1771. The Court clarified in Purkett that it is the opponent of the peremptory strike who always has the burden of proving purposeful racial discrimination; the proponent of the strike need not disprove racial discrimination. Id. As the Court stated, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Id.

In this case, the trial court apparently concluded that Petitioners had raised a sufficient inference to meet their burden of a prima facie showing of discrimination under the first step of the Batson analysis, stating that an explanation under the second step of Batson was in order. T.p. at 577.

Of course, it is important to note that the prima facie showing required under step one of Batson is minimal. See Batson, 476 U.S. at 96-98; Hernandez v. New York, 500 U.S. at 358.

Once the court finds that the party objecting to the strike has made the requisite prima facie showing of racial discrimination, then the court is to require the party exercising the peremptory challenge to provide a race-neutral explanation for the removal of the particular juror in question from the jury. Batson, 476 U.S. at 96-98. However, where the attorney exercising the peremptory strike provides an explanation for the peremptory challenge prior to the trial court's actual finding that a prima facie case of discrimination has been shown, the reviewing court may assume that the trial court implicitly found a prima facie case of discrimination, even where there was no formal finding with regard to step one. State v. Hernandez, 589 N.E.2d at 1314.

The explanation offered to support the exercise of the peremptory challenge must be race neutral, reasonably specific, and related to the issues to be addressed in the pending trial. Purkett, 514 U.S. at ____, 115 S. Ct. at 1774. See also Batson, 476 U.S. at 97. As stated by the Supreme Court in Purkett, any race-neutral explanation will be sufficient to rebut a prima facie case of discrimination at this stage in the inquiry. Purkett, 514 U.S. at ____, 115 S. Ct. at 1774. A trial court must accept the neutral explanation unless the court concludes under step three of the analysis that the peremptory challenge was in fact racially motivated. Id.

In this case, counsel for Respondent NLO offered a lengthy and detailed race-neutral explanation for the exercise of a peremptory strike against Ms. Adams.[7] T.p. 577-79.

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[7]See discussion supra at pp. 3-7.

Clearly, counsel for Respondent NLO offered an explanation which was race neutral, specific, and related to the issues to be litigated in the pending trial as required. Purkett, 514 U.S. at ____, 115 S. Ct. at 1774. The explanation offered by counsel for Respondent NLO was appropriately accepted by the trial court as sufficient to rebut any prima facie inference of racial motivation at the second step of the Batson inquiry.

As previously stated, a trial court must accept the race-neutral explanation offered by the proponent of the peremptory strike unless the court concludes under step three of the analysis that the peremptory challenge was in fact racially motivated. Id. Under step three of the Batson inquiry, the trial court must determine whether or not the opponent of the peremptory strike, in this case the Petitioner, has proven purposeful racial discrimination. Batson, 476 U.S. at 98. As the Supreme Court explains in Batson, at this point "the trial judges's findings . . . largely will turn on evaluation of [the striking attorney's] credibility. . . ." Id. at 98 n.21.[8] Thus, on more than one occasion, this Court has established that the sincerity and credibility of the

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[8]As stated by the Supreme Court in Hernandez v. New York:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

500 U.S. at 365.

striking attorney as a decisive factor to be considered by the trial court under step three of a Batson challenge.

The trial court followed the law established by this Court. The record in this case leaves no doubt that the trial judge, both during the trial and in his decision on Petitioner's Motion for New Trial, engaged in an analysis of the striking attorney's credibility, sincerity and motivations, weighed the relevant facts and circumstances and concluded that the Petitioner had failed to show that the proponent of the strike was motivated by racial animus in exercising a peremptory challenge to Ms. Adams. Counsel for Petitioner was given the opportunity to fully present her arguments in support of her objection to the exercise of a peremptory challenge against Ms. Adams. The arguments presented to the trial court at this point were essentially the same arguments which Petitioner has presented to this Court in her Petition. After listening to these arguments, the responses of counsel for Respondent NLO, observing the demeanor of the juror, and observing the demeanor and sincerity of counsel for Respondent NLO, the trial court concluded that the explanation offered was credible and not the product of racial motivation.[9]

In this case, the trial court gave both parties a full opportunity to be heard on the issue, allowed Petitioner a

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[9]Petitioner cites the cases of State v. Robertson, 630 N.E.2d 422 (Ohio Ct. App. 1993) and State v. Tuck, 610 N.E.2d 591 (Ohio Ct. App. 1992) in support of her argument that the trial court failed to understand or to follow a proper analysis as required by Batson. However, unlike the case before the Court, in both Robertson and Tuck, the trial court failed to provide the party objecting to the strike a full opportunity to sustain their burden of showing that the motivation behind the exercise of the peremptory challenge at issue was racial discrimination. Robertson, 630 N.E.2d at 430; Tuck, 610 N.E.2d at 593-94. These same arguments were presented to the court below and rejected.

full opportunity to show that the race neutral explanation offered was merely a pretext for racial discrimination, and concluded that the statement was not pretextual. Therefore, the Court should conclude that the decision of the trial court was not clearly erroneous and affirm the trial court's decision.

### C. An Appellate Court, In Reviewing A Trial Court's Determination That A Particular Peremptory Challenge Is Not Racially Motivated Under Batson Should Not Disturb The Decision Of The Trial Court Absent Clear Error.

In the case at bar, Petitioner seeks to have this Court adopt a proposition of law which would essentially hold that a court of appeals may not review a record on appeal to evaluate the sufficiency or credibility of the race-neutral explanation offered by the proponent of the strike where, the trial court has arguably not articulated its analysis artfully. She asserts, at least impliedly, that such an evaluation by the court of appeals is somehow constitutionally impermissible.[10]

While the Ohio Supreme Court held that no error occurred in the trial court's rejection of Petitioner's Batson

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[10]In both Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995) and Montiel v. Los Angeles, 2 F.3d 335 (9th Cir. 1993), relied upon by Petitioner, the appellate court was forced to remand the case to the trial court because the trial court had conducted no Batson inquiry, including allowing the party objecting to the peremptory challenge to make its prima facie showing of discrimination under step one of the Batson analysis. There was, therefore, no record of a Batson inquiry for the appellate court to review.

objection, Petitioner asks this Court to reject its well settled "clearly erroneous" standard in favor of a standard whereby reversal is mandatory if a trial court does not articulate its Batson analysis in a particular manner. This Court specifically rejected such a standard in Batson. 476 U.S. at 99 (specifically declining "to formulate particular procedures to be followed.").[11]

Petitioner proposes a rule by which the court of appeals' role on Batson issues would be reduced to that of a mere rubber stamp--"reversed" if any lack of clarity or error is found; "affirmed" if not. Such a restricted role for the court of appeals has never been part of the law of Ohio, or of any jurisdiction in modern Anglo-American jurisprudence. Instead, courts of appeals have always been empowered to examine the record more deeply and are not limited to simply locating errors.

Seven members of the United States Supreme Court in Purkett allowed the Court of Appeals to perform precisely the evaluation which Petitioner here claims is not permitted. 514 U.S. 765, 115 S. Ct. 1769. Further, the two members of the Court who dissented from the Purkett ruling specifically stated their approval of the consideration of the Batson analysis by the Court of Appeals based on the record before it. Id. (Stevens, J. and Breyer, J., dissenting). Thus, Purkett stands in precise contravention to Petitioner's position asserted in her Petition.

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[11]An appellate court reviewing a finding that no discriminatory intent was present may reverse such a finding only where "the trial court's decision was clearly erroneous, that is, 'so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process, * * * or equal protection.'" State v. Belcher, 623 N.E.2d 583, 587 (Ohio Ct. App. 1993) (quoting Hernandez v. New York, 500 U.S. at 368).

## D. No Evidence Exists Supporting The Contention That Respondent Employed A "Double Standard" In Their Dealings With Members Of The Venire In A Manner Demonstrating Racial Animus.

Petitioner argues that counsel for Respondent NLO applied a "double standard" to African-American and Caucasian venirepersons throughout the jury selection process. Once again Petitioner misrepresents and mischaracterizes the record of the proceedings below.[12]

With regard to her allegation that counsel for Respondent NLO employed a "double standard" concerning venirepersons' employment status and level of education, Petitioner claims that even while claiming to strike Ms. Adams for having "very limited" education and being "unemployed," defense counsel fought to retain white jurors with fewer years of schooling than Juror Adams. Petition at p. 8-9. As evidence of this, Petitioner claims that

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[12]Petitioner also notes, once again, her allegation of a certain statement which was alleged to have been made by one defense counsel, who neither conducted voir dire nor actively participated in trial, upon exiting the men's room in the courthouse shortly after the jury was sworn. She claims that this, too, shows purposeful discrimination on the part of the defense in this case. However, as an officer of the court, the attorney in question denied ever making such a statement. T.p. at 600. Petitioner fails to note, however, that she neither offered nor proffered any evidence supporting her claim that the statement was made, nor did she testify under oath that such a statement was made nor did her counsel as an officer of the court proffer evidence. Therefore, she denied to the Court any evidence, if any existed, upon which to do other than it did, which was to proceed with the trial.

prospective jurors Chapman, Hughes, and Berting, three of the six eventual Caucasian sitting jurors, had no more than high school education. Petition at p. 8. In fact, based on the Juror Questionnaires, all three of these jurors had graduated from high school, in contrast with Ms. Adams, who did not graduate from high school. Petitioner also cites defense counsel's decision not to challenge alternate juror Taphorn as evidence of this "double standard," even though, in contrast to Ms. Adams, Mrs. Taphorn, who was an alternate juror, had significant life and work experience. Petition at 8-9. Additionally, at the time of the consideration of Ms. Taphorn, Respondent did not have any peremptory challenges remaining.

However, Petitioner fails to mention that in stark contrast to Ms. Adams, Jurors Chapman, Jordan, Hughes, Berting, and alternate juror Taphorn were all either employed or possessed significant employment experience at the time of the trial, as clearly indicated on the Juror Questionnaires. Surely the Petitioner would not deny that work experience and life experience enable individuals, especially those with limited formal educational backgrounds, to enhance their analytical and cognitive skills as well as their understanding of the world around them. As such, Respondent's counsel made a valid, race-neutral distinction in choosing to exercise a peremptory challenge against Ms. Adams, a twenty-eight year old, unemployed individual with limited education and choosing not to use its last remaining challenge to exclude Chapman, Jordan, Hughes, Berting, or Taphorn, individuals who had more formal education, had completed high school and also had employment experience working outside the home.

To further support her argument, Petitioner also refers to the fact that counsel for Respondent NLO opposed Petitioner's motion to excuse for cause Caucasian venireperson Usher and that counsel for Respondent NLO

passed for cause on Caucasian venireperson Bishop and then opposed Petitioner's motion to excuse Bishop for cause. Petition at pp. 8-9. In setting forth this argument, Petitioner once again exhibits a lack of understanding about the crucial difference between strikes for "cause" and peremptory strikes. See Berk v. Matthews, 559 N.E.2d 1301, 1309 (Ohio 1990). See also Sowers v. Middletown Hosp., 626 N.E.2d 968, 976-77 (Ohio Ct. App. 1993); Carpenter v. Bonniway Leasing, Inc., 627 N.E.2d 1030, 1031-32 (Ohio Ct. App. 1993).[13]

Additionally, Petitioner fails to mention that Bishop was employed as a factory worker at the time of the trial and that Usher had worked as an electronics technician before he retired. This differentiates them from Adams, thus providing a race neutral distinction which renders Petitioner's "double standard" argument insupportable.

In her allegation that counsel for Respondent NLO employed a "double standard" with respect to employment status by not challenging for cause or using a peremptory challenge to strike prospective jurors Hughes, Wismer, and Taphorn, Petitioner simply misunderstands the significance of employment status. The distinction to be made is between those individuals who have never worked and those who have some work experience. Whether or not a potential juror was working at the time of the trial is not, as the

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[13]The decision to remove a juror for cause is in the discretion of the trial court, while the use of peremptory challenges is within the discretion of the parties. Counsel's motions to strike for "cause" and opposition to opposing counsel's motions to strike for cause do not support a claim of racial animus with regard to peremptory challenges. Petitioner also neglects to mention that the stated reason why counsel for Respondent NLO opposed Petitioner's motion to excuse Bishop for cause was because counsel for Respondent NLO did not believe that Bishop's hypertension, a condition also suffered by Mr. Hicks, was a valid reason to exclude Bishop. T.p. at 451.

Petitioner suggests, where the significance lies. Rather, the issue is whether a potential juror has the enhanced level of sophistication that comes from having a history of employment, regardless of whether the juror is actually employed at the very time of the trial.

Further, with regard to the differences between Mrs. Taphorn and Ms. Adams, the trial court examined the specific issue which Petitioner now seeks to argue supports her claim of racial bias. T.p. at 589-593. The trial court examined the specific issues raised by the Petitioner and concluded that there existed objective race neutral distinctions between Ms. Adams and Mrs. Taphorn, as well as other Jurors. The trial court also recognized the difference in the level of alertness between Ms. Adams and Mrs. Taphorn. T.p. at 591.

Petitioner further alleges that counsel for Respondent NLO applied a "double standard" to African-American and Caucasian venirepersons who knew persons involved in the trial, by pointing to the fact that counsel for Respondent NLO opposed excusing prospective jurors Totlis and Winter, two Caucasian venirepersons who claimed to know persons involved in the trial, while they asked the court to excuse Ms. Hazeley, an African-American who knew Ms. Hicks. Petition at 5-6. Petitioner fails to understand the trial court's role in observing the juror's demeanor to determine whether the juror can serve impartially despite his familiarity with an individual involved in the case. Due to Petitioner's failure to recognize the subjective and contemporaneous nature of the trial court's discretion in this area, a close review of the record is once again necessary.

Mr. Totlis indicated on the second day of voir dire that he knew defendants' expert witness, Dr. Eugene Saenger. T.p. 524. Totlis served on a board of trustees with Dr. Saenger and indicated that he thought Dr. Saenger was an "[h]onorable gentleman with integrity, dedicated to

his profession, active in the community" and a "nice guy." T.p. 524. When asked if he thought his familiarity with Dr.Saenger would result in his giving Dr. Saenger more credence than other expert witnesses, Mr. Totlis twice assured the court that he could serve as an objective juror. T.p. 524.

Ms. Winters stated during voir dire by counsel for Petitioner that she believed she recognized Mr. Hawkins, counsel for Respondent NLO, from church and that she was in a Sunday School class with Mrs. Hawkins. T.p. 514. The trial court inquired as to whether Ms. Winters felt she could be impartial and she assured the court that she could. T.p. 516.

Thus, both Mr. Totlis and Ms. Winters clearly stated on the record that their familiarity with individuals involved in the case would not effect their ability to be impartial. T.pp. 515-516. For this reason, Counsel for Respondent NLO opposed excusing Mr. Totlis and Ms. Winters for cause. T.p. 540.

In contrast, Ms. Hazeley worked at the University of Cincinnati where Mrs. Hicks worked, knew Mrs. Hicks from this workplace, and had prior exposure to the claims of Mrs. Hicks through a television program. T.pp. 117-120. While Petitioner contends that the exclusion of Ms. Hazeley is another example of the racial animus which motivated Respondent's counsel throughout the juror selection process, it was hardly unreasonable for the trial court to conclude that because Ms. Hazeley worked at the University of Cincinnati Hospital where Mrs. Hick's worked, knew Mrs. Hick's from this workplace, and had prior exposure to the claims of Mrs. Hicks through a television program, she would be potentially

biased and should be excused. T.pp. 117-120.[14] Counsel for Respondent clearly stated that the reason Ms. Hazeley should be removed from the jury pool was the "emotional connection" and the awareness which she had shown concerning the issues and personalities before the trial court in this case. T.p. 120.

In discussing their allegation that counsel for Respondent NLO employed a "double standard" concerning juror's "levels of sophistication," Petitioner attempts to juxtapose Respondent's concerns about Ms. Adams' lack of sophistication with what they refer to as Respondent's "lenient attitude" toward three Caucasian venirepersons who eventually became sitting jurors--Jurors Chapman, Jordan, and Hughes. Petition at p. 5, 8, 9. In making such an argument, Petitioner ignores the significant differences that exist in the level of sophistication present in a prospective juror who has had limited formal education and has little or no work experience and one who has limited formal education, but who has a work history. Such a difference represents a valid race-neutral distinction on which Respondent's counsel based the decision on where to exercise peremptory challenges.

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[14]Ms. Hazeley immediately identified Mrs. Hicks in response to the following question asked by counsel for Petitioner: "Have you or anyone that you know ever been on the premises at the Feed Materials Production Center?" T.p. 117. Therefore, Ms. Hazeley knew immediately the identity of Mrs. Hicks and that she was connected to claims centered on the Fernald facility. Ms. Hazeley gave further evidence of potential bias when she indicated that she had seen a special on television in which Mrs. Hicks was "talking about what had happened with her husband there." T.p. 118. She stated that she had paid special attention to the show and that the show "stood out in my mind," because of her relationship with Mrs. Hicks from their work together at the University of Cincinnati Hospital. T.p. 118.

Finally, Petitioner claims that the discriminatory animus of counsel for Respondent NLO can be seen in the trial court's removal of prospective juror Virginia Elahee for cause. Petitioner outrageously claims that counsel for Respondent NLO intentionally misled the trial court in an effort to have Ms. Elahee removed from the jury. This issue has been raised below and has been rejected, including by the trial court which was in the best position to determine whether it had been misled.

Virginia Elahee indicated during voir dire that her brother had worked at the Fernald facility. T.p. 162. She stated that her brother was a pipe fitter by profession, and that she thought he was involved in "general labor" type work at the Fernald site. T.p. 166. She stated further that she had heard information concerning Fernald that "there was some leakage or something," which involved materials which were "radioactive or something like that." T.pp. 168-171. After their initial interview of Ms. Elahee, neither party sought to challenge her presence in the juror pool.

When she was questioned again by the parties, Ms. Elahee indicated that her brother had worked at the Fernald facility around 10 years ago, which would place it around 1983. T.p. 464-465. When counsel for Respondent NLO raised the issue of the relationship between Ms. Elahee and her brother who had been employed at the Fernald facility, he pointed out that his concern focused on the fact that Ms. Elahee's brother potentially was a member of a class of workers bringing suit against Respondent NLO as a result of their work at the Fernald facility. T.pp. 368-69. Counsel for Respondent NLO made it clear to the trial court that the concern over Ms. Elahee's presence in the petit jury was that, as a first-line relative, she potentially stood to be a direct beneficiary of any benefit which inured to her brother as a result of his participation in a class action suit against the Respondent in this case. T.pp. 372.

The transcript of these proceedings shows that the underlying concern expressed by counsel for Respondent NLO concerning Ms. Elahee was the potential financial benefit, and that it was against this background that Respondents' counsel raised the issue of potential financial interest, outlined in the Ohio statute dealing with juror exclusions for cause, Ohio Rev. Code § 2313.42. T.pp. 469-70. Once the court was reminded of the importance of the fact that Ms. Elahee's brother was a potential participant in a class action suit against the facility at issue in this case, the court was open to hearing further arguments from counsel on whether Ms. Elahee should be excused for cause. At no point did counsel for Respondent NLO state that Ohio Rev. Code § 2313.42 specifically and automatically excluded Ms. Elahee from the jury. [15]

Thus, the record clearly reveals that Petitioner's argument that counsel for Respondent NLO employed a "double standard" is neither plausible nor supported by the record of the proceeding below. Every one of the jurors cited in Petitioner's Brief are distinguishable from Ms. Adams based on a race-neutral characteristic. Thus, Petitioner's "double standard" argument, while imaginative, is simply absurd.

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[15] Rather, Respondent's counsel pointed out that one of the things this statutory scheme was concerned about was excluding jurors who had a potential financial interest in matters related to the case in which they were a potential juror. T.pp. 476-77. The trial court was not misled, and, quite reasonably concluded that the potential financial interest of Ms. Elahee in another case related to the Fernald facility was a sufficient justification to excuse her for cause. The court concluded that such an exclusion was "in keeping with our policy" of eliminating all possible bias from the jury in this case, particularly with sufficient members of the jury pool from which to choose. T.p. 483.

## III. CONCLUSION

Pursuant to this Court's rules, review on a writ of certiorari is entirely in the discretion of the Court and is appropriate from a state court of last resort when that Court has decided an important question of federal law in a manner that is in conflict with the decisions of this Court or on a question that has not been settled by this Court. Rule 10, Rules of the United States Supreme Court. In this case, Petitioner is seeking to have this Court review a finding of fact by the trial court, not an unsettled constitutional issue or a decision of a state supreme court in conflict with the decisions of this Court. Such a review is not appropriate for review by this Court.

For these reason, and for all the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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